No. 23-80

IN THE

Supreme Court of the United States

JEFFREY LAYDON, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioner,

v.

COOPERATIEVE RABOBANK U.A., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF TOSHIBA CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE[1]

Toshiba Corporation ("Toshiba"), a Japanese corporation, lists its common stock solely on Japanese stock exchanges. Toshiba is subject to oversight by Japan's Financial Services Agency ("FSA") and Japan's Securities Exchange and Surveillance Commission, and is required to comply with the formal requirements for listing on Japanese stock exchanges. Toshiba does not list any securities on any exchange in the United States, nor does it offer or sell any securities in the United States. Toshiba has no reporting obligations to the U.S. Securities and Exchange Commission.

In 2015, Toshiba disclosed certain accounting irregularities, and after an investigation, the FSA imposed on Toshiba the largest fine ever imposed by that agency. Hundreds of investors, including U.S. investors, sued Toshiba in Japan, alleging violations of Japanese securities law.

Despite Toshiba's choice not to list or trade its securities in the United States, and despite the availability of remedies in Japan, Toshiba was sued under §10(b) of the U.S. Securities Exchange Act ("the Exchange Act"), 15 U.S.C. §78j, in a putative class action in the Central District of California. Toshiba moved to dismiss under *Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247 (2010), arguing

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[1] All parties received notice of Toshiba Corporation's intent to file this brief on August 17, 2023. No counsel for a party in this case authored this brief in whole or in part. No person or entity – other than the *amicus* or its counsel – made a monetary contribution to fund the preparation or submission of this brief.

that the Exchange Act does not apply to securities-fraud claims against a foreign issuer that did not list its securities on a U.S. exchange or otherwise trade its securities in the United States. *See*, *Stoyas v. Toshiba Corp.*, 191 F. Supp. 3d 1080, 1089 (C.D. Cal. 2016), *rev'd*, 896 F.3d 933 (9th Cir. 2018). In *Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings SE*, 763 F.3d 198, 216 (2d Cir. 2014), the Second Circuit held that a domestic transaction is necessary, but not in itself sufficient to permit application of the Exchange Act where the defendant's conduct is "so predominantly foreign" as to render the statute's application "impermissibly extraterritorial." Applying the Second Circuit's reasoning, the District Court granted Toshiba's motion. Toshiba, 191 F. Supp. 3d at 1100. The District Court explained that, although *Morrison* did not reach the issue, "all the policy and reasoning in *Morrison*" pointed against application of the Exchange Act based on domestic transactions alone, absent some "affirmative act by Toshiba related to the purchase and sale of securities in the United States." *Id.* at 1094-95. Plaintiffs appealed to the Ninth Circuit.

The Ninth Circuit reversed, explicitly rejecting the Second Circuit's holding in *Parkcentral*. *See Toshiba*, 896 F.3d at 952. If the plaintiffs had brought their claims against Toshiba in the Second Circuit instead of the Ninth, the Second Circuit, pursuant to *Parkcentral*, would have affirmed dismissal of the claims.

Toshiba sought *certiorari*, presenting the question splitting the Ninth and Second Circuits: whether a domestic transaction is both necessary and sufficient for application of the Exchange Act, or necessary but

not, in itself, sufficient. Pet. for a Writ of *Cert.*, *Toshiba Corp. v. Auto. Indus. Pension Tr. Fund*, No. 18-486 (U.S. Sup. Ct. Oct. 15, 2018). This Court denied *certiorari*. *Toshiba Corp. v. Auto. Indus. Pension Tr. Fund*, 139 S. Ct. 2766 (2019). Consequently – in addition to defending itself in the courts of Japan – Toshiba has been forced to proceed to litigation in federal court in California, enduring costly, burdensome, and disruptive litigation, including discovery.

Since *Parkcentral* and *Toshiba* were decided, the Second Circuit in *Prime Int'l Trading, Ltd. v. BP P.L.C.*, 937 F.3d 94 (2d Cir. 2019), and the instant case, and the First Circuit in *SEC v. Morrone*, 997 F.3d 52 (1st Cir. 2021), have applied *Morrison*'s transactional test to other claims involving foreign conduct and brought under the Exchange Act and the Commodity Exchange Act ("CEA"), both transaction-focused investment-fraud statutes. The question presented by all of these cases is the same: Where a claim under transaction-focused investment-fraud statutes like the Exchange Act and the CEA involves both domestic and foreign activities, does a domestic transaction suffice, in itself, to permit application of the statute? The decisions of the Ninth and First Circuits are diametrically opposed to the decisions of the Second Circuit.

The Court should grant *certiorari* in this case to guide U.S. courts in applying *Morrison*'s transactional test to claims under these transaction-focused investment-fraud statutes while avoiding the interference with foreign regulation that *Morrison* forbids. *See Morrison,* 561 U.S. at 266 ("It is a rare case of prohibited extraterritorial application that

lacks *all* contact with the territory of the United States.") (original emphasis).

SUMMARY OF ARGUMENT

This case involves a clear and irreconcilable conflict among the Circuits on a critical question concerning the extraterritorial application of U.S. investment-fraud statutes like the Exchange Act and the CEA. Although federal laws are presumed to "have only domestic application," *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 335 (2019), claims brought under federal laws may involve both foreign and domestic activity. U.S. courts are frequently called upon to determine whether an investment-fraud claim involving foreign conduct implicates a domestic application of U.S. law.

In *Morrison*, this Court held that this determination turns on the relationship between the facts of the case and "the 'focus' of congressional concern," 561 U.S. at 266, *i.e.*, "the object of [the statute's] solicitude, which can include the conduct it seeks to regulate as well as the parties and interests it seeks to protect or vindicate," *Abitron Austria GmbH v. Hetronic Int'l, Inc.*, 216 L. Ed. 2d 1013, 1022 (2023) (internal quotation marks omitted). *Morrison* held that, because the "focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States," that statute applies only to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities." 561 U.S. at 266-27. This Court has since applied *Morrison*'s holding that a claim requires extraterritorial application of a statute unless the claim involves conduct relevant to

a statute's "focus" occurring within the United States. *Abitron*, 216 L. Ed. 2d at 1028 (applying to Lanham Act); *RJR Nabisco,* 579 U.S. at 337-38 (applying to RICO); *WesternGeco LLC v. Ion Geophysical Corp.*, 138 S. Ct. 2129, 2136 (2018) (applying to Patent Act).

However, because the claim in *Morrison* did not involve any domestic transaction, this Court did not then address the question posed here: Where a claim under transaction-focused investment-fraud statutes like the Exchange Act and the CEA involves both domestic and foreign activities, does a domestic transaction suffice, in itself, to permit application of the statute? In addressing that question, the Circuits have reached antithetical results.

The Second Circuit has interpreted *Morrison* as holding that although "a domestic securities transaction" – the "focus" of §10b – is a "necessary" condition to domestic application of the Exchange Act, "such a transaction is not alone sufficient." *Parkcentral*, 763 F.3d at 214-15. In *Parkcentral*, the court held that even where a claim involves a domestic securities transaction, the Exchange Act does not apply where the defendant's conduct is "so predominantly foreign" as to render application of the statute "impermissibly extraterritorial." *Id.* at 216.

The Ninth Circuit found *Parkcentral*'s "predominantly foreign" standard to be "an open-ended, under-defined multi-factor test, akin to the vague and unpredictable tests that *Morrison* criticized and endeavored to replace with a 'clear,' administrable rule." *Toshiba*, 896 F.3d at 950 (internal citation omitted). Therefore, the Ninth

Circuit rejected the Second Circuit's standard as "contrary to" *Morrison*. *Id.*

Like *Parkcentral*, *Toshiba*, *Prime International*, and *Morrone*, the instant case involves claims presenting the same fundamental question that *Morrison* did not address and on which the Circuits have diverged: Where a claim under transaction-focused investment-fraud statutes like the Exchange Act and the CEA involves both domestic and foreign activities, does a domestic transaction suffice, in itself, to permit application of the statute? The Circuits' conflict on this question raises an issue of exceptional importance regarding the extraterritorial application of U.S. law and potential interference with foreign nations' regulation of their own markets. This Court should resolve that conflict.

In considering whether to grant *certiorari* in *Toshiba*, this Court called for the views of the Solicitor General, *Toshiba Corp. v. Auto. Indus. Pension Tr. Fund*, 139 S. Ct. 935 (2019), who, on behalf of the United States, acknowledged that, regardless of the factual distinctions between the cases, the Ninth Circuit's conclusion in *Toshiba* is "inconsistent" with the Second Circuit's in *Parkcentral*, Br. for the United States as Amicus Curiae 20, *Toshiba Corp. v. Auto. Indus. Pension Tr. Fund*, No. 18-486 (U.S. Sup. Ct. May 20, 2019) ("U.S. *Toshiba* Amicus Br."). Nevertheless, the Solicitor General recommended that the Court deny *certiorari* in *Toshiba,* suggesting that the Second Circuit might revise its position in light of this Court's intervening decisions in *RJR Nabisco* and *WesternGeco*. *Id.* at 18-20.

But the Second Circuit has not revised its position since *Parkcentral.* Instead, that Circuit has reaffirmed its "predominantly foreign" standard, applying it to the CEA. *See Prime Int'l Trading, Ltd.,* 937 F.3d at 106-07 (2d Cir. 2019). Meanwhile, the First Circuit has joined the Ninth in rejecting that standard as "inconsistent with *Morrison,"* and holding that a domestic transaction is both necessary *and* sufficient to permit domestic application of the Exchange Act. *Morrone,* 997 F.3d at 60 (1st Cir. 2021).

ARGUMENT

This Court Should Resolve The Irreconcilable Conflict Among The Circuits On The Important Question Raised In This Case Concerning The Application of *Morrison* To U.S. Transaction-Focused Investment-Fraud Statutes.

A. There Is An Irreconcilable Conflict Among The Circuits.

"It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Abitron*, 216 L.Ed. 2d at 1018 (quoting *Morrison*, 561 U.S. at 255) (internal quotation marks omitted). Absent "the affirmative intention of the Congress clearly expressed" to give a statute extraterritorial effect, "we must presume it is primarily concerned with domestic conditions." *Morrison,* 561 U.S. at 255 (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 246 (1991)).

However, as the *Morrison* Court noted, "[i]t is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States." 561 U.S. at 266 (original emphasis). Indeed, the presumption against extraterritorial application may not be "self-evidently dispositive," and may "require[] further analysis." *Id.* Thus, a court determining whether a statute applies to a claim involving foreign activity must determine not only whether the statute applies extraterritorially, but also whether the claim involves a domestic application of the statute. The *Morrison* Court held that a claim involving foreign conduct calls for extraterritorial application of a statute unless the claim alleges domestic conduct relevant to the statute's "focus." *Id.*

But although *Morrison* held that such domestic activity is *necessary* to permit application of a non-extraterritorial U.S. statute, the Court had no occasion to (and did not) address whether such activity is, in itself, *sufficient* to permit application of the statute. In adjudicating transaction-focused investment-fraud statutes, the Circuits have reached diametrically opposed conclusions. In the years since *Toshiba,* the conflict has widened and become entrenched.

1. In *Morrison*, This Court Held That Domestic Application Of A Statute Requires Conduct Within The United States Relevant To The Statute's "Focus."

The plaintiffs in *Morrison* sought damages from National Australia Bank ("NAB") under §10(b) of the Exchange Act. NAB's stock was not traded on any U.S. exchange, and the plaintiffs had purchased their NAB stock on the Australian Stock Exchange. The plaintiffs asserted that §10(b) applied, nevertheless, because NAB defrauded them by overstating the value of a Florida subsidiary.

This Court applied what it would later describe as a "two-step framework for analyzing extra-territoriality issues." *RJR Nabisco*, 579 U.S. at 337. Finding no "affirmative intention of the Congress clearly expressed," the Court first held that the Exchange Act does not apply extraterritorially. *Morrison,* 561 U.S. at 255, 265.

The Court then examined whether the plaintiffs had alleged a domestic application of §10(b). *Id.* at 266. Emphasizing that the presumption against extraterritoriality is not overcome "whenever *some* domestic activity is involved in the case," *id.*, the Court "reject[ed] the notion that the Exchange Act reaches conduct in this country affecting exchanges or transactions abroad . . . ." *Id.* at 269.

To avoid the "interference with foreign securities regulation that application of § 10(b) abroad would produce," the *Morrison* Court adopted a "transactional

test," *id.*, holding that the Exchange Act's "focus" is "not upon the place where the deception originated, but upon purchases and sales of securities in the United States," *id.* at 266, and that the statute applies only to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities." *Id.* at 267. Because the securities at issue in *Morrison* were not listed on a domestic exchange, and the plaintiffs did not allege a domestic transaction, the Court found §10(b) inapplicable. *Id.* at 273.

The *Morrison* Court thus made clear that where a §10(b) claim does not involve securities listed on a U.S. exchange, a domestic transaction – *i.e.,* conduct relevant to the statute's "focus" – is *necessary* to permit application of the statute. But because *Morrison* did not involve any domestic transaction, the Court had no occasion to address the related question – whether a domestic transaction is by itself *sufficient* to permit such a claim. Resolution of this question by the Circuits has resulted in an irreconcilable conflict among them.

2. The Second Circuit Interprets *Morrison* As Holding That, Under A Transaction-Focused Statute, A Domestic Transaction Is Necessary But Not Always Sufficient To Ensure Domestic Application Of The Statute.

In *Parkcentral*, plaintiffs sought damages under the Exchange Act, alleging that Porsche had fraudulently manipulated the price of Volkswagen stock, damaging parties to "swap agreements."

Parkcentral, 763 F.3d at 201. The VW shares to which the swap agreements were pegged did not trade on U.S. exchanges, and plaintiffs did not allege that Porsche was a party to the swap agreements, or a participant in the market for swaps in any way. *Id.* at 207. Additionally, Porsche's allegedly fraudulent conduct had been "the subject of investigation by German regulatory authorities and adjudication in German courts." *Id.* at 216. The *Parkcentral* court held that applying §10(b) to these facts would be an impermissibly extraterritorial application of the statute, even if the plaintiffs obtained the securities in domestic transactions. *Id.*

Applying *Morrison,* the *Parkcentral* court held that the "predominat[ing]" consideration in determining whether the proposed application of §10(b) was impermissibly extraterritorial would be the "potential for incompatibility between U.S. and foreign law," *id.* at 216-17, reasoning that "if an application of the law would obviously be incompatible with foreign regulation, and Congress has not addressed that conflict, the application is one which Congress did not intend," *id.* at 215-16 (stating as a "corollary" of *Morrison*'s conclusion, "if an extraterritorial application of federal law would likely be incompatible with foreign law, and that application was intended by Congress, Congress would have addressed the conflict").

The *Parkcentral* court also pointed to *Morrison's* description of its transactional test in terms of "necessary elements rather than sufficient conditions," and emphasized that in *Morrison,* this Court "never said that an application of § 10(b) *will* be

deemed domestic *whenever* such a transaction is present." *Id.* at 215. The Second Circuit therefore held that *Morrison* does not permit "treating the location of a transaction as the definitive factor in the extraterritoriality inquiry." *Id.* As the *Parkcentral* court put it, "a rule making the statute applicable whenever the plaintiff's suit is predicated on a domestic transaction, regardless of the foreignness of the facts constituting the defendant's alleged violation, would seriously undermine *Morrison*'s insistence that § 10(b) has no extraterritorial application." *Id.* Although the plaintiffs' swap transactions in *Parkcentral* had been "concluded domestically," *id.* at 207, the Second Circuit held that under *Morrison*, "the relevant actions in this case are so predominantly German as to compel the conclusion that the complaints fail to invoke § 10(b) in a manner consistent with the presumption against extraterritoriality," *id.* at 216 (citing *Morrison*, 561 U.S. at 266).

3. The Ninth Circuit Expressly Rejects The Second Circuit's Interpretation Of *Morrison* And Has Adopted A Diametrically Opposed Interpretation.

In *Toshiba*, 896 F.3d 933, the Ninth Circuit expressly rejected the Second Circuit's reading of *Morrison,* and adopted an interpretation that is irreconcilable with the Second Circuit's.

The *Toshiba* plaintiffs purport to represent a class of purchasers – in over-the-counter transactions in the United States – of American Depository Receipts ("ADRs") referencing Toshiba stock listed solely in Japan. The ADRs at issue in *Toshiba* are unsponsored

– *i.e.,* they represent "two-party contract[s]" between the depositary and the ADR holders – involving no participation by Toshiba. 896 F.3d at 941. Toshiba has no reporting obligations with the SEC as a result of the ADRs.

The District Court in *Toshiba* acknowledged that "[f]acially," the plaintiffs' claim involved domestic transactions. *Toshiba*, 191 F. Supp. 3d at 1094. The court, nevertheless, granted Toshiba's motion to dismiss. *Id.* at 1094-95, 1100. The District Court explained that *Morrison* did not allow application of the U.S. securities laws to Toshiba. *Id.* at 1094-95. The District Court applied the same reasoning as the Second Circuit in *Parkcentral*, 763 F.3d at 216, which held that a domestic transaction is necessary, but not in itself sufficient to permit application of the Exchange Act where the defendant's conduct is "so predominantly foreign" as to render the statute's application "impermissibly extraterritorial." *See Toshiba*, 191 F. Supp. 3d at 1094-95.

The District Court held that to read *Morrison* as holding that the Exchange Act *always* applies to a securities fraud claim involving a domestic securities transaction would lead to the "essentially limitless reach of § 10(b) claims" because the independent actions of actors in the United States could create liability for a foreign issuer even if that issuer had done all it could to keep its securities from being sold in the United States. *Id.* Such a result, the District Court held – where the claim is against a foreign issuer that did not participate in the transaction, made any allegedly fraudulent statements abroad, has not entered the U.S. securities markets, and is

subject to ongoing oversight by foreign securities regulators – would be "inconsistent with the spirit and law of *Morrison*." *Id.*

The Ninth Circuit reversed, however, rejecting *Parkcentral* and holding that this result "turns *Morrison* and Section 10(b) on their heads," and that the "location of the transaction" is dispositive. *Toshiba*, 896 F.3d at 949. In the Ninth Circuit's view, §10(b) applies whenever a claim involves a domestic transaction, regardless of the predominance of foreign conduct, the effect on foreign exchanges, or the interference with securities regulation in foreign nations.

4. In The Face Of This Conflict, The Second Circuit Has Reaffirmed Its Interpretation of *Morrison*.

In considering *certiorari* in *Toshiba*, this Court sought the views of the Solicitor General, *Toshiba Corp.*, 139 S. Ct. 935, who agreed with the Ninth Circuit's conclusion that the Second Circuit's ruling was "inconsistent" with *Toshiba.* U.S. *Toshiba* Amicus Br. 20. Nevertheless, the Solicitor General recommended that the Court deny *certiorari*, suggesting that the Second Circuit might reconsider its position in light of this Court's intervening decisions in *RJR Nabisco* and *WesternGeco. Id.* at 18-20. But the Second Circuit has not reconsidered its ruling in *Parkcentral.* Instead, it has reaffirmed the "predominantly foreign" standard.

In *Prime International*, 937 F.3d at 98, 100, individuals and entities who traded futures and derivatives contracts pegged to the price of Brent

crude sought damages under the CEA, alleging that defendants involved in production manipulated the market for Brent crude. The court assumed without deciding that the plaintiffs' trades were "domestic transactions," but held that the rule announced in *Parkcentral* – i.e., that "a domestic transaction or listing is *necessary*" but "not alone sufficient" to state a claim under §10(b) of the Exchange Act – applies to the CEA. *Id.* at 105 (original emphasis). Finding the facts alleged to be "predominately foreign," the *Prime International* court held that applying the CEA in that case would be "impermissibly extraterritorial," and dismissed. *Id.* at 106 (quoting *Parkcentral,* 763 F.3d at 216).

The Second Circuit maintained that *Morrison* compelled this conclusion, explaining:

> Permitting a suit to go forward any time a domestic transaction is pleaded would turn the presumption against extraterritoriality into a "craven watchdog," *Morrison,* 561 U.S. at 266, and would fly in the face of the Supreme Court's clear guidance that the presumption against extraterritoriality cannot evaporate any time "*some* domestic activity is involved in the case," *id.* (original emphasis).

Id. Thus, despite the Ninth Circuit's explicit rejection of the *Parkcentral* standard, the Solicitor General's opinion that *Parkcentral*'s reading of *Morrison* is incorrect, and the invitation to the Second Circuit to

revise its position, the Second Circuit has only reaffirmed the *Parkcentral* standard.

5. The First Circuit Has Joined the Ninth In Rejecting the Second Circuit's Interpretation of *Morrison*.

After the Second Circuit's decision in *Prime International,* the First Circuit joined the Ninth in expressly rejecting *Parkcentral* and holding that a domestic transaction is not only necessary, but sufficient to permit application of U.S. securities laws to a claim involving foreign conduct.

The defendants in *Morrone,* 997 F.3d at 56, solicited investment in their company by "targeting investors in Europe." The company sent to those who chose to invest stock "subscription agreements," which the investors executed in Europe, returning them to the company, which executed them in the United States. *Id.* at 60. The *Morrone* court found that, despite the activity in Europe, *see id.* at 57, the stock subscription agreements were domestic transactions because they were executed in the United States. *Id.* at 60.

The defendants asserted that "the analysis does not end here," and urged the court to adopt the Second Circuit's holding in *Parkcentral*, but the *Morrone* court found the Second Circuit's approach "inconsistent with *Morrison*." *Id.* The *Morrone* court quoted this Court's declaration in *Morrison*: "it is in our view only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies." *Id.*

(quoting *Morrison,* 561 U.S. at 267). In holding that foreign transactions are excluded, the *Morrison* Court did not hold that all domestic transactions are included, yet (following the *Toshiba* court) the *Morrone* court held: "The existence of a domestic transaction suffices to apply the federal securities laws under *Morrison*. No further inquiry is required." *Id.*

B. The Instant Case Turns On The Circuit Split Over *Morrison*'s Application to U.S. Transaction-Focused Investment-Fraud Statutes.

The courts in *Parkcentral*, *Stoyas*, *Prime International*, *Morrone*, and now *Laydon*, all applied *Morrison*'s transactional test to determine whether U.S. investment-fraud statutes like the Exchange Act and the CEA could be applied to claims involving foreign conduct.

Here, Petitioner claims he was damaged in trading Euroyen TIBOR futures contracts, the value of which he alleges was distorted by Respondents' manipulation – in Europe – of "benchmark rates" used to determine that value. *Laydon v. Coöperatieve Rabobank U.A.*, 55 F.4th 86, 93-94 (2d Cir. 2022). Interpreting the CEA "in light of the presumption against extra-territoriality," the Second Circuit applied the "two-step framework" this Court adopted in *Morrison. Id.* at 95-96. First, the court found no "affirmative intention by Congress to give [the CEA] extraterritorial effect." *Id.* at 96. Then, finding that "the focus of the [CEA] is transactional," the

court held that CEA claims must be based on "transactions occurring in the territory of the United States." *Id.*

Although Respondents alleged such domestic transactions, the court held that "[s]imply pleading a domestic transaction … is not enough." *Id.* Expressly following *Parkcentral,* the court concluded:

> A plaintiff must thus plead not only a domestic transaction, but also sufficiently domestic conduct by the defendant. In other words, "Plaintiffs' claims must not be 'so predominantly foreign as to be impermissibly extraterritorial.'"

Id. (quoting *Prime Int'l*, 937 F.3d at 105 (quoting *Parkcentral*, 763 F.3d at 216)).

Respondents seek to distinguish *Parkcentral, Toshiba,* and *Morrone* from this case by noting that the CEA's text and structure are different from the Exchange Act's. Br. in Opp'n 2, 11. But Respondents identify no difference between the statutes that is relevant to the *Morrison* analysis – in fact, there is none.

Respondents emphasize that §10(b) of the Exchange Act "create[s] substantive legal obligations on its own," while §22(a)(1) of the CEA "*confers* an express right of action to enforce other statutory provisions," and that §10(b) "does not 'wor[k] in tandem' with other provisions of the Exchange Act in the same way Section 22 of the CEA 'works in tandem'

with the substantive provisions it expressly references." *Id.* at 16-17 (original emphasis) (citing *WesternGeco*, 138 S. Ct. at 2137). From this, Respondents argue that:

> Whether or not *Parkcentral* correctly read a single substantive provision (Section 10(b)) to require both a domestic transaction and domestic conduct, that holding is not implicated by a decision, like *Prime*, that roots these two requirements separately in a cause-of-action provision (Section 22) and substantive statutory provisions.

Id. at 17.

But the fact that, unlike §10(b), the CEA locates the standard for access to a cause of action in a provision separate from the provisions specifying substantive obligations is a distinction without a difference for purposes of the *Morrison* analysis. Respondents acknowledge that §10(b) *both* "impl[ies] its own private right of action" *and* creates "substantive legal obligations." Br. in Opp'n at 16-17. Thus, the Ninth and First Circuits' conclusion that *Morrison* permits a §10(b) claim based solely on the presence of a domestic transaction necessarily means that a domestic transaction is sufficient *both* to access the private right of action under §10(b) *and* to delimit the legal obligations under §10(b). Because those Circuits hold that a domestic transaction is sufficient for both purposes under §10(b), those Circuits *necessarily* would hold, in direct conflict with the Second Circuit in *Prime International* and the instant case, that a domestic transaction would be sufficient

for the first purpose – access to a private right of action – under Section 22. *See Morrison*, 561 U.S. at 266-68 (explaining that "the focus of the Exchange Act" is "upon purchases and sales of securities in the United States"); Br. in Opp'n at 21-22 (acknowledging "the 'focus' of Section 22 is 'transactional'" (citing *Prime Int'l*, 937 F.3d at 104)).

Respondents are also incorrect that the Second Circuit in *Prime International* "roots these two requirements" – a domestic transaction and domestic conduct – "separately in a cause-of-action provision (Section 22) and substantive statutory provisions." Br. in Opp'n at 17. As the Second Circuit wrote in this case:

> [A]llowing a plaintiff to state a domestic application of Section 22 based merely on a domestic transaction "would . . . divorce the private right afforded in Section 22 from the requirement of a domestic violation of a substantive provision of the CEA." A plaintiff must thus plead not only a domestic transaction, but also sufficiently domestic conduct by the defendant. In other words, "Plaintiffs' claims must not be so predominantly foreign as to be impermissibly extraterritorial."

Laydon, 55 F.4th at 96 (quoting *Prime Int'l*, 937 F.3d at 105, and *Parkcentral*, 763 F.3d at 216) (internal citation omitted).

C. The Conflict Between the Circuits Over *Morrison* Is Square, Irreconcilable, and Has Created Forum-Shopping Risk.

Respondents are incorrect that the conflict here has been "manufacture[d]," *id.* at 11, because it cannot be seriously disputed that the Ninth Circuit's ruling in *Toshiba* and the First Circuit's in *Morrone* are the precise opposite of the Second Circuit's in *Parkcentral, Prime International,* and now in this case. And the Ninth and First Circuits have not only adopted a rule contrary to the Second Circuit's, they have expressly and specifically criticized the latter's approach as "contrary to" (*Toshiba,* 896 F.3d at 50), and "inconsistent with" (*Morrone,* 997 F.3d at 60), *Morrison*, and even as "turn[ing] *Morrison* and Section 10(b) on their heads" (*Toshiba,* 896 F.3d at 49). The *Toshiba* court held that the Second Circuit's rule is based on "speculation about Congressional intent, an inquiry *Morrison* rebukes," and described the Second Circuit's holding as adopting "an open-ended, under-defined multi-factor test, akin to the vague and unpredictable tests that *Morrison* criticized and endeavored to replace with a 'clear,' administrable rule." *Id.* at 950. It is difficult to imagine a clearer statement of an intractable conflict among the Circuits, including between the two most important Circuits (the Second and the Ninth) for securities and commodities cases. *See* Westlaw Litigation Analytics, Securities/Commodities/ Exchanges (last visited Aug. 25, 2023), https://1.next.westlaw.com/Analytics/Profiler?docGUID=Securities%252FCommodities%252FExchanges&contentType=casetype&originationContext=typeAhead&transitionType=LegalLitigation&contextData=(sc.

Default)&analyticNavigation=none&pathAnalytic=%2FAnalytics%2FHome#/casetype/Securities%2FCommodities%2FExchanges/caseHistoryReport (filtered by "court" and "Federal circuit") (showing that since 2004 the Ninth and Second Circuits have handled more securities and commodities cases than all other circuits combined").

There can be no doubt that the square conflict among the Circuits regarding the proper application of *Morrison*'s transactional test has become entrenched. As the ruling in this matter demonstrates, the Second Circuit and courts therein have fallen into line with *Prime International* and apply *Parkcentral* where the claims are predominantly foreign. *See Cavello Bay Reinsurance Ltd. v. Stein*, 986 F.3d 161, 168 (2d Cir. 2021) (Exchange Act); *In re London Silver Fixing, Ltd.*, No. 14-MD-2573-VEC, 2023 U.S. District LEXIS 88627, at *37 (S.D.N.Y. May 22, 2023) (CEA); *In re Platinum & Palladium Antitrust Litig.*, 449 F. Supp. 3d 290, at 330-31 (S.D.N.Y. 2020) (CEA).

New cases, meanwhile, continue to be brought in the Ninth Circuit against foreign defendants who took no steps to enter the U.S. securities market, based on allegations of predominantly foreign conduct involving securities not issued in the United States or listed on a U.S. exchange. *See, e.g.*, *Sheet Metal Workers Nat'l Pension Fund v. Aktiengesellschaft*, No. 20-cv-04737-RS, 2023 U.S. Dist. LEXIS 88178, at *14, *18 (N. D. Cal. May 19, 2023) (applying Exchange Act to purchases of ADRs referencing shares traded on the Frankfurt Stock Exchange in Germany); *DalPoggetto v. Wirecard AG*, No. 2:19-cv-00986

(C.D. Cal. Feb. 14, 2020) (involving German defendants, alleged misrepresentations in German securities filings regarding a Singapore subsidiary, and over-the-counter trades in unsponsored ADRs and F-shares); *Hashem v. NMC Health Plc*, No. 2:20-cv-02303 (C.D. Cal. Mar. 10, 2020) (involving U.K. defendant, alleged misrepresentations regarding foreign acquisitions and construction projects in the UAE, and over-the-counter trades in unsponsored ADRs); *Gabbard v. PharmaCielo Ltd.*, No. 2:20-cv-02182 (C.D. Cal. Mar. 6, 2020) (involving Canadian defendant, alleged misrepresentations regarding cannabis oil operations in Colombia and related party transactions, and over-the-counter trades in F-shares); *Lavdas v. Metro Bank PLC*, No. 2:19-cv-04739 (C.D. Cal. Jan. 10, 2020) (involving U.K. bank defendant, alleged misrepresentations regarding the strength of the bank's capital base, and over-the-counter trades in F-shares). Which reading of *Morrison* U.S. courts must follow could be decisive in all such cases.

D. The Square Conflict Among The Circuits Concerns An Issue of Exceptional Importance With Serious Foreign Policy Implications.

The issue now before the Court is one of significant national and international importance. This Court has recognized the importance of the question presented, calling for the views of the Executive Branch regarding *certiorari* in *Toshiba*. More than four years ago, even before the conflict grew wider and more entrenched, the Solicitor General acknowledged that the international comity concerns raised by

Toshiba and amici regarding the question presented were "weighty" and must be taken "seriously." *See* U.S. *Toshiba* Amicus Br. 21.

The unusually broad support at the petition stage favoring *certiorari* in *Toshiba* further demonstrates the importance of the issue. *See* David H. Kistenbroker et al., *Global Securities Litigation Trends*, Harvard Law School Forum on Corporate Governance (July 29, 2019), https://corpgov.law.harvard.edu/2019/07/29/global-securities-litigation-trends/. Thirteen amici (in eight briefs) urged the Court to review the question presented by Toshiba: Japan's Ministry of Economy, Trade and Industry; the Government of the United Kingdom of Great Britain and Northern Ireland; the U.S. Chamber of Commerce; the Securities Industry and Financial Markets Association ("SIFMA"); Competitive Enterprise Institute; Keidanren ("Japan Business Federation"); EuropeanIssuers; Économiesuisse; the International Chamber of Commerce of Switzerland; Association Française des Entreprises Privées; the Organization for International Investment; the Institute of International Bankers; and the Swiss Bankers Association.

The United Kingdom wrote that the ruling in *Toshiba*:

> [I]nvolves a particularly alarming example of interference with a foreign nation's legal system, because the Ninth Circuit's decision would immediately allow private U.S. plaintiffs to undermine a foreign government's usual regulation of its domestic securities markets,

> even when a foreign-registered company's own activities have no factual nexus to the United States.

Br. of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Supp. of the Pet'r 2, *Toshiba Corp. v. Auto. Indus. Pension Tr. Fund*, No. 18-486 (U.S. Sup. Ct. Dec. 4, 2018) ("U.K. *Toshiba* Amicus Br."). Japan raised a similar warning: "[T]he effect of [the Ninth Circuit's] decision on the Japanese companies, stakeholders and economy is extremely large." Br. of The Ministry of Economy, Trade and Industry of Japan as Amicus Curiae in Supp. of Pet'r 2, *Toshiba Corp. v. Auto. Indus. Pension Tr. Fund*, No. 18-486 (U.S. Sup. Ct. Nov.2, 2018).

Such interference raises serious concerns not only for foreign defendants like Toshiba. The Ninth and First Circuits' mechanistic rule significantly increases the risk that U.S. market participants will be dragged into litigation around the world to face the reciprocal application of foreign laws. *See* Br. of the Securities Industry and Financial Markets Association and the Competitive Enterprise Institute as Amici Curiae Supporting Pet'r 18-19, *Toshiba Corp. v. Auto. Indus. Pension Tr. Fund*, No. 18-486 (U.S. Sup. Ct. Dec. 6, 2018); U.K. *Toshiba* Amicus Br. 10 (warning that foreign regulators now may be "apt to resist [U.S.] enforcement efforts and perhaps to retaliate with counter-measures of their own"); Suppl. Br. for Pet'r 12, *Toshiba Corp. v. Auto. Indus. Pension Tr. Fund*, No. 18-486 (U.S. Sup. Ct. June 3, 2019). In any event, *Morrison* did not hold that extraterritorial application is permissible so long as foreign interference is

"unlikely," *see* U.S. *Toshiba* Amicus Br. 21; that approach perverts the meaning of a "presumption" against extraterritorial application, *see Morrison*, 561 U.S. at 255 (holding "[t]he canon or presumption applies regardless of whether there is a risk of conflict between the American statute and a foreign law").

The question presented thus goes to the heart of how *Morrison* should be applied – not only with respect to the Exchange Act or CEA, but every other statute where the presumption against extraterritoriality is at issue. *See* Br. for the Chamber of Commerce of the United States of America as Amicus Curiae in Supp. of Pet'r 19-20, *Toshiba Corp. v. Auto. Indus. Pension Tr. Fund*, No. 18-486 (U.S. Sup. Ct. Dec. 6, 2018) (citing various statutes to which the presumption has been applied); *see also Morrison,* 561 U.S. at 266 ("[I]t is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States.") (original emphasis). And until this Court resolves the conflict among the Circuits, "the fate of the reach of exposure for multinational companies remains uncertain across jurisdictions." David H. Kistenbroker et al., *supra*, https://corpgov.law.harvard.edu/2019/07/29/global-securities-litigation-trends/.

CONCLUSION

The square split among the Circuits in applying *Morrison* is irreconcilable and entrenched. For the foregoing reasons, the Court should grant *certiorari*

and resolve the conflict among the Circuits on this important question concerning the extraterritorial application of U.S. law.

Respectfully submitted,

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